United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

76-1291

United States Court of Appeals
FOR THE SECOND CIRCUIT

Docket No. 76-1291

UNITED STATES OF AMERICA,

Appellee,

—*v.*—

JEROME RAPOPORT,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT JEROME RAPOPORT

CURTIS, MALLET-PREVOST, COLT & MOSLE
Attorneys for the Defendant Rapoport
100 Wall Street
New York, New York 10005

PETER FLEMING JR.
JOHN E. SPRIZZO
ELIOT LAUER
of Counsel

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BRIEF FOR DEFENDANT JEROME RAPOPORT

Preliminary Statement

Defendant Jerome Rapoport appeals from a judgment of conviction entered against him in the United States District Court for the Southern District of New York on June 10, 1976, after trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Rapoport was tried three times before he finally was convicted. Both prior trials ended in hung juries, the last split 9-3 in Rapoport's favor.

Each trial was based upon a charge or charges that Rapoport caused certain corporate borrowers to make false statements in connection with their applications for SBA guaranteed loans.

The Small Business Administration ("SBA") loans money directly and also guarantees bank loans. In a guaranteed loan situation, the applicant applies to a commercial bank for an SBA guaranteed loan. The merits of the loan are considered by the bank and, if approved as qualified, the loan application is forwarded to the SBA for its consideration. If approved by the SBA for guarantee, the loan is closed and the proceeds are disbursed by the bank, which in turn receives an SBA guarantee of 90% of the loan amount in the event of default (Tr. 51-54).*

Standard application forms are required for SBA guaranteed loans. These call for various items of information such as the name and address of the applicant, the amount of the loan requested, and the use to which the proceeds of the loan are to be put. The application is accompanied by other relevant materials such as current financial statements and a narrative description of the applicant's business. The application and the supporting naterials constitute the loan package (A 175-185, GX 1-4).

The charges against Rapoport centered upon paragraph 10 of the standard application form which calls for the disclosure of the recipient and amount of any fee paid by the applicant for assistance in obtaining the loan (A 176-185, GX 1-4, p. 3).

It was alleged that paragraph 10 of certain loan applications contained false statements in that they did not disclose that Rapoport had agreed to obtain a loan for various applicants in return for a fee equal to 10% of the loan proceeds. The prosecution witnesses—all of whom had received either formal or informal immunity—testified to such an agreement. Rapoport testified and denied such an agreement.

* References "A" are to the pages of the appendix, "GX" to a government exhibit, "Tr" to portions of the trial transcript which do not appear in the appendix.

A. The First Indictment and Trial

Rapoport was first indicted on December 3, 1974. Indictment 74 Cr. 1141 had to do with the SBA loan application of Entre Nous Graphics, Inc. ("Entre Nous"). Its principal, Allan Pollak, testified under immunity that Rapoport had agreed to obtain a loan in return for a 10% fee, and had advised Pollak not to disclose the fee in paragraph 10 of the Entre Nous loan application. Rapoport denied Pollak's version of the facts. On May 13, 1975, after a one-week trial and two days of deliberations, the jury disagreed and a mistrial was declared.

B. The Second Indictment and Trial

A superceding indictment was filed on June 19, 1975. Indictment 75 Cr. 609 also concerned itself only with the Entre Nous transaction. Pollak again testified to his version of the transaction. Rapoport again denied it. The prosecution also was allowed to introduce evidence of Rapoport's alleged conduct on other SBA loan applications, purportedly as "similar acts." On November 29, 1975, again after a one-week trial and two days of deliberation, the jury disagreed, this time by a reported vote of 9-3 in Rapoport's favor.

C. The Third Trial

The prosecution decided almost immediately to try Rapoport a third time. It first obtained a new and third indictment, 75 Cr. 1246, which added six new false statement counts of questionable sufficiency, and which added also two false swearing counts based upon clearly immaterial and collateral inquiry during Rapoport's cross-examination at his second trial.

In order to obtain and thereafter prove these eight new counts, the prosecution immunized at least eight witnesses,

all of whom were immunized informally by the prosecutor without the advice and consent of the Attorney General. One of the witnesses was a CPA who received immunity even though he had admitted paying bribes to a bank loan officer.

Two of the new false statement counts (Four and Five) were dismissed for insufficiency. One of the two false swearing counts (Eight) also was dismissed. On April 26, 1976, after a two-week trial and less than one day's deliberation, the jury convicted Rapoport on the remaining six counts.

On June 10, 1976, Rapoport was sentenced to concurrent two year terms on the false statement counts, and to a *consecutive* one year term on the false swearing count.

Statement of Facts

All the loan applications at the third trial were signed by officers of the corporate applicants. Rapoport signed none. He was charged however with causing these various officers to make a false statement in the various applications.

The alleged false statements were identical in kind. With regard to each false statement count it was alleged that Rapoport had caused the applicants *not* to disclose that Rapoport, in the words of the indictment, was to receive a 10% fee "for obtaining the loan" in question (A 4-9).

Officers of the four corporate loan applicants testified for the prosecution. All received immunity in return for their testimony. These witnesses were Pollak (Entre Nous Graphics, Inc.), Stolar and Bernstein (Electrical Precision Meter Corporation), Goggi (Goggi International, Inc.), and Rosenbaum and Inspector (Smuggler's Attic, Inc.).

With two exceptions, Stolar and Bernstein, these witnesses told similar stories, namely, that they had agreed to pay Rapoport a fee equal to 10% of any loan proceeds in return for Rapoport's assistance in obtaining the loan (A 32-33, 40, 79, 84-85).

The exceptions, Stolar and Bernstein, said that Rapoport had asked them for a 10% fee for obtaining a loan, but instead had agreed at their insistence to enter into an executed consulting agreement with their corporation for a period of two years (A 55-56, 67-68, GX 7).

Rapoport, as at his first two trials, testified in his own defense. He admitted a fee agreement with each of the corporate applicants, but denied that his agreement was to assist the applicants in obtaining a loan. A former SBA employee for two years, Rapoport said he told each applicant that he would not accept any fee in connection with any loan application, that he did not want to be classified as a "finder" of SBA loans, that he would not help in *obtaining* any loans, that his expertise was financial, and that he would be willing to serve only as a financial consultant for a fee should the applicant become viable by reason of SBA guaranteed financing (A 113, 119, 121, 123-128).

Rapoport's testimony received substantial support from the other evidence in the case, including some from the prosecution witnesses. While the applicants said they had agreed to pay Rapoport for *obtaining* their loans, the evidence established without dispute:

> (a) That each applicant obtained its loan from its own bank through bank officers known to them and, for the most part, unknown to Rapoport who played no part in introducing the applicants to the lending banks or in negotiating the loans (A 34, 42, 64-65, 79, 92-94).
>
> (b) That with one exception, Rapoport never spoke alone to any bank officer or SBA official in connection with the loan applications, much less pro-

moted those applications with either the banks or the SBA (A 36, 42, 74-76, 79-80).

(c) That in connection with the one application which Rapoport did discuss with a banker (Entre Nous), Rapoport told both responsible bank officers that he would *not* make the loan if he were the bank, that the application was "weak," and that Pollak, the principal officer of Entre Nous, was a good promoter but a bad businessman (A 133, 138).

(d) That the borrowing corporations booked Rapoport's 10% fee as a prepaid expense for future services *after* the loans were disbursed (A 64, 81).

Not a single prosecution witness could testify to any single thing which Rapoport had done to assist the particular applicant in obtaining its loan. See, *e.g.*, A 36. Their testimony was consistent that the applicants had approached their own banks, had prepared their own financial statements and other information, had prepared their own applications, and had conducted their own negotiations.

At best, the only evidence of "assistance" on Rapoport's part was that on some occasions, but not all, Rapoport had reviewed the loan application package for sufficiency and had attended some of the loan closings.

The prosecution offered no evidence of corruption on Rapoport's part, and the bankers and SBA officials who did testify denied the receipt of any cash or gifts (A 30, 131, 133, Tr 969). The only evidence of corruption was that the accountant for Smuggler's Attic, one Blonder, had paid money to Gazziano, the lending officer at Bank Leumi who approved and disbursed the loan. (A 47-49).

Finally, tape-recordings of three conversations between Polla. (Entre Nous) and Rapoport were introduced. Two were ambiguous at best on the true nature of the fee agreement on that loan. The third however flatly supported Rapoport. It was of a telephone call placed by Pollak to Rapoport on August 13, 1974, three weeks after the Entre Nous loan had closed. During that conversation, Rapoport repeatedly stated his understanding that his fee was for future consulting services. More important, Pollak, who admittedly was seeking incriminating admissions from Rapoport, *never denied Rapoport's recollection and in effect conceded its truth.* The entire transcript of this conversation is contained in the Appendix (A 189-199).

Statutes Involved

18 U.S.C. 2

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal.

18 U.S.C. 1001

Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

18 U.S.C. 1014

Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers' Home Administration, any Federal intermediate credit bank, or any division, officer, or employee thereof, or of any corporation organized under sections 1131–1134m of Title 12, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal Home Loan Bank, the Federal Home Loan Bank Board, the Home Owners' Loan Corporation, a Federal Savings and Loan Association, a Federal land bank, a joint-stock land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, or a Federal credit union, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $5,000 or imprisoned not more than two years, or both.

Summary of Argument

A third trial, after two hung juries, is permitted in this Circuit. We believe however that the decision to try a defendant for the third time should be reviewed with care, and that evidence of improper procedure and trial error should not be considered as harmless and should result in reversal.

Having decided upon a third trial, the prosecution decided not to rest on the Entre Nous transaction alone, apparently for fear of an acquittal or yet another hung jury. It returned to the grand jury and obtained a new and third indictment which proliferated tenous false statement counts and which added also two false swearing counts based upon collateral and immaterial testimony by Rapoport during the defense of his second trial. This tactic resulted in a trial replete with evidentiary insufficiency and other error.

For reasons later set forth in detail, the proliferation of false statement counts caused the prosecution to elect a theory of guilt which was not supported by the evidence on those counts.

The inclusion of the false swearing counts, which were based upon testimony which was not material to any issue at the second trial, resulted in trial poison which requires reversal of the entire conviction unless this Court finds that the element of materiality was proved.

Finally, the apparent anxiety to convict this defendant by any means led to prosecutorial excess during summation of a type even worse than that warned against by this Court in two very recent decision

Errors in the court's instructions, and other matters, also require reversal.

POINT I

In his rebuttal summation, the prosecutor said that even the best lawyer "money can buy" could not save the defendant. This statement, and one other, was so improper as to require a new trial in itself.

The prosecution's theme in this case was money. The Assistant opened by telling the jury it was about to learn "how Jerome Rapoport . . . made more than $120,000 by advising people to tell lies" (A 28). The fact that Rapoport lived on Park Avenue was mentioned by virtually every witness (Tr 186, 304-305, 308, 336, 377, 393, 421, 529). The insinuation that Rapoport had paid-off to obtain the loans was always present, despite the absence of any evidence. The impression, without proof, was that Rapoport was a man who could buy favors (A 51-52, 108, 110, 171-172). But this tactic went too far when, in his rebuttal summation, the prosecutor also insinuated that Rapoport's money could buy justice.

Summations were split under new Rule 29.1. During the defense summation, counsel argued simply that Rapoport's version of the fee agreements was correct, that the August 13 taped telephone conversation with Pollak proved this, and that the prosecution witnesses, having *all* received immunity, were not worthy of belief beyond a reasonable doubt. There was nothing in the defense summation to justify what followed.

The prosecutor opened his rebuttal summation by stating flatly, with regard to defense counsel (A 152):

> "Every defendant in this country is entitled to the effective assistance of counsel, but even the very best counsel money can buy can't disentangle this man—."

A mistrial was demanded immediately but was denied, even though Judge Brieant said he would grant a mistrial except for his "faith" in the jury's ability to ignore the statement which Judge Brieant later characterized as "bad" (A 152, 158-159).

A mistrial should have been declared. Two prior juries had disagreed on Rapoport's guilt or innocence, the last heavily in Rapoport's favor. The history of the case demonstrated the close issue of credibility. Judge Brieant could not assume that the jury in this third trial would be able to disregard the prosecutor's remark. See *Bruton* v. *United States,* 391 U.S. 123 (1968). And the misconduct was not an inadvertent slip. It came at the very outset of the rebuttal summation after a fifteen-minute recess (Tr. 1130). Clearly it was planned.

The remark tore directly at the heart of the adversary system. It cast doubt on the credibility of defense counsel and sought to establish the "mouthpiece" image. It drew the prejudicial picture of a low-paid government lawyer seeking justice despite the wealth of the business defendant.

Moreover, the prosecutor had no basis upon which to base his assertion as to the lawyer's fee. In fact, on that question, the statement was untrue since Rapoport has as yet been unable to pay for the defense of the third trial or for this appeal.

This misrepresentation would require reversal if the prosecutor knew the truth. See *United States* v. *Universita,* 298 F.2d 365 (2d Cir.), *cert. denied,* 370 U.S. 950 (1962). Since the prosecutor made the statement without knowledge or concern for its truth, the same result should follow. His statement exceeded fair argument, indeed was not argument at all, and, especially in the context of this case, was so consciously inflammatory as to require reversal of Rapoport's conviction.

On two recent occasions this Court has warned against "numerous departures from approved prosecutorial advocacy." *United States* v. *Bivona,* 487 F.2d 443, 447 (2d Cir. 1973); *United States* v. *White,* 486 F.2d 204 (2d Cir. 1973), *cert. denied,* 415 U.S. 980 (1974). Indeed, in the *Bivona* case, Chief Judge Kaufman noted specifically the promise of the United States Attorney "to caution against repetition" of such improprieties. 487 F.2d at 447. Apparently this Court's admonitions in fact have gone unheeded, as is demonstrated in this case. See *United States* v. *Estepa,* 471 F.2d 1132 (2d Cir. 1972).

Nor was this the only instance of serious impropriety during summation. The issue in the Entre Nous transaction, as on the other loans, was whether Rapoport's fee was for obtaining the loan or for future consulting services. On June 6, 1974, after the loan application had been filed with his bank, Pollak of Entre Nous made a long recorded statement to AUSA George Wilson, after first receiving a promise of immunity. Pollak told Wilson that Rapoport had done nothing to obtain the loan, that Pollak could have done as much himself, that the application was filed "in accordance with law", and that Pollak wanted "action" on the loan (A 99-101).

Defense counsel argued that these statements impeached and cast doubt on the credibility of Pollak's testimony as a whole, and specifically contradicted his claim that Rapoport had caused him illegally to conceal Rapoport's fee in the Entre Nous loan application. This argument was interrupted by the prosecutor, who did more than object (A 150-151):

> "Mr. Cutner: I object, your Honor. It was very clear that he [Pollak] told Wilson that he was paying Rapoport the fee."

In context, the clear import of the statement was that Pollak had told Wilson on June 6 that he was paying Rapoport to obtain the loan and that his prior loan application therefore was false. Defense counsel immediately noted that there was "absolutely no evidence" to support the prosecutor's statement, and requested a mistrial which was denied.

There was no evidence in the record to support the prosecutor's claim about the June 6 interview. The statement misrepresented the record, as the prosecutor must have known, and clearly was intentional since the defense argument was based squarely on the record and therefore was totally unobjectionable in any event. The statement amounted to testimony *by the prosecutor* of a purported prior consistent statement by Pollak which would have been inadmissible even from Pollak himself, and which went to the very heart of the only issue on trial, namely, the nature of Rapoport's fee agreements and their non-disclosure.

POINT II

The conviction for false swearing was based upon testimony which was immaterial when given during cross-examination at Rapoport's second trial.

Towards the end of his long cross-examination at his second trial, Rapoport was asked about his connection with the previously unmentioned and unrelated loan application of American Medical Supply Company. Rapoport denied receiving cash payments "on that loan", and claimed that he had entered into a consulting agreement with that company (A 18).

The third indictment contained two false swearing counts based upon this cross-examination. Count Eight charged

falsity in Rapoport's denial of cash payments "on" the American Medical loan. Count Nine charged falsity in Rapoport's claim of a consulting agreement with that company.

The inclusion of these false swearing counts was highly prejudicial. Count Eight allowed the introduction of evidence of secretive cash payments, one at a golf club, and generated an instruction by Judge Brieant that evidence of payment "in an unusual or clandestine fashion . . . may or may not have a bearing on the issue of whether the fees paid were, in fact, consulting fees or not" (A 157-158). Yet even the prosecution admitted that most of Count Eight was insufficient because of error in the form of the questions at the second trial and yet proceeded to trial on the novel theory that a transcript entry "Nodding negatively" was sufficient to convict (A 103-110). Judge Brieant rejected this argument and eventually dismissed the count (A 110-112). But a mistrial was denied, otherwise inadmissible evidence of cash payments remained in the record and in the jurors' minds, see, *e.g.*, *United States* v. *Freedman*, 445 F.2d 1220, 1226 (2d Cir. 1971), and the prejudicial instruction about "clandestine" payments followed.

The inclusion of the second false swearing charge (Count Nine) was even more pernicious. By charging that Rapoport had lied about the existence of a consulting agreement with American Medical Supply, the inclusion of the Ninth Count struck directly at Rapoport's only defense to the false statement counts since it meant that a grand jury had rejected this defense as false. The potential impact on the trial jury is obvious, and the prosecutor wasted no time in making the point. In the second paragraph of his opening statement, the prosecutor said (A 29):

> "Now some people are willing to do or say anything for money. In [Rapoport's] case one lie led to another until he found himself before a group of jurors just like yourselves, charged with counselling his clients to make false statements, to tell lies.
>
> In defending himself, this man again did not respect the law. He did not tell the truth. Instead, before a group of jurors, just like yourselves, he made more untruths, more false statements, this time under oath, on his oath, this man, a lawyer, gave perjury."*

Finally, the *only* testimony which the jury requested during its deliberations was the testimony relating to the Ninth Count. Conviction on all counts came immediately thereafter.

The false swearing counts obviously were designed to prejudice Rapoport's third trial defense on *all* counts. But they should not have been in the case at all. Both should have been dismissed and a mistrial declared, since they were based upon testimony which clearly was immaterial to the issues at the trial in which it was given.

A. The Applicable Standard of Materiality

The question is whether the alleged false swearing was material to the issues raised in Rapoport's *second* trial which involved the Entre Nous loan only.

Materiality is of course an essential element of the offense of false swearing under 18 U.S.C. 1623. *United States* v. *Mancuso,* 485 F.2d 275, 280 (2d Cir. 1973). And, where a false swearing charge is based upon trial testimony, an especially strict standard of materiality exists,

*The prosecutor did not say however that the second trial jury—which heard and saw the alleged false swearing—had voted 9-3 to acquit Rapoport, even though that information had been elicited by the prosecution itself immediately after the second hung jury.

as opposed to testimony in a grand jury investigation where the scope of inquiry is broad and the limits of relevance less clear. See *United States* v. *Stone,* 429 F.2d 138, 140 (2d Cir. 1970); *United States* v. *Mancuso,* 485 F.2d 275, 281, n. 17 (2d Cir. 1973).

To establish the materiality of Rapoport's second trial testimony, the prosecution's burden was to demonstrate the relevance of that testimony to an issue *at the second trial,* and to demonstrate also that contrary and purportedly truthful answers by Rapoport "could have been of sufficient probative importance . . . so that, as a minimum, further fruitful investigation would have occurred." *United States* v. *Freedman,* 445 F.2d 1220, 1227 (2d Cir. 1971). See also, *United States* v. *Gugliaro,* 501 F.2d 68 (2d Cir. 1974). Judge Brieant recognized these precise standards in his instruction to the jury on this element (A 156-157).

B. The Second Trial

The only crime charged at the second trial was that Rapoport had caused Pollak to make a false statement in the Entre Nous loan application which, in its paragraph 10, stated "NONE" as to whether any fees had been or would be paid to obtain or assist in obtaining the loan. Pollak said this was false in that he had promised Rapoport a 10% fee for obtaining the loan. Rapoport said this was true because his fee agreement was for future consulting services and not for obtaining the loan.

No issue of knowledge or intent existed. Rapoport admitted an intimacy with the applicable SBA disclosure rules, and admitted that he knew disclosure of his fee was required in paragraph 10 if it were to be paid for obtaining the loan. He simply denied any such agreement.

Nor was there any issue of identity. Rapoport admitted he was the man with whom Pollak had dealt. He simply

said that Pollak's version of their dealings and agreement was incorrect.

The only issue for the jury at the second trial was whether Rapoport had agreed to obtain a loan for a fee. In these circumstances, it is clear that evidence of other alleged but unrelated criminal conduct by Rapoport was inadmissible under the rule which forbids evidence of a defendant's propensity to engage in criminal conduct of the kind under indictment and on trial. *United States* v. *Deaton,* 381 F.2d 114, 117 (2d Cir. 1967); *United States* v. *Miranda,* 526 F.2d 1319, 1331 (2d Cir. 1975); Rule 404 (b), Fed. R. Evid.; I *Wigmore* § 192 (3 ed. 1940).

In order to prove that a defendant robbed Bank X, the prosecution may not offer evidence to prove that he also robbed Bank Y. *United States* v. *Magee,* 261 F.2d 609 (7th Cir. 1958).

The evidence at the second trial about the American Medical loan was pure propensity evidence. After Rapoport's supposedly false answers on cross-examination, the company's principals, Samarel and Raymond, testified as rebuttal witnesses that Rapoport had been paid $30,000 in cash for obtaining an SBA loan and that no consulting agreement was involved or even discussed. (A 20, 25-27).

This supposedly truthful testimony—had it also been given by Rapoport—would have proved nothing about Rapoport's agreement in connection with the Entre Nous application, which was the only matter on trial at the second trial. At best, or actually at worst, these supposedly truthful answers would only have established that Rapoport received a cash fee from American Medical for obtaining its loan or, in short, that Rapoport had a *propensity* to obtain SBA loans for a 10% fee.

The prosecution sought to avoid the problem by urging that proof of this other "crime" was admissible at the sec-

ond trial as evidence of a "common scheme or plan" on Rapoport's part. It urged that Rapoport's claim of a consulting agreement with Pollak and Entre Nous was a sham intended to conceal the real purpose of his fee, and that this was proved by evidence that he had entered into *similar sham consulting agreements* with other applicants for the same purpose (A 15-17, 21). But even this tenuous argument did not give relevance to the American Medical transaction.

The prosecution's evidence on the American Medical Supply loan had nothing to do with any such scheme. Neither of the corporate principles testified to a sham consulting agreement, and in fact denied that a consulting agreement was ever discussed or suggested, as a sham cover-up or otherwise (A 20). The prosecution's evidence on American Medical did not establish a "common scheme or plan" and therefore did not satisfy even the prosecution's attenuated theory of relevance.

Dean Wigmore makes this precise distinction between evidence which proves propensity only, and evidence which establishes a defendant's common scheme or plan, I *Wigmore* § 192 (3d ed. 1940):

> "In other words, it cannot be argued: 'Because A did an act X last year, therefore he probably did the act X as now charged.' Human action being infinitely varied, there is no adequate probative connection between the two. A may do the act once, and may never do it again; and not only may he not do it again, but it is in no degree probable that he will do it again."

And, while recognizing the exception for evidence which tends to show design or plan, *ibid,* Wigmore is quite specific as to the kind of proof required where evidence of similar

conduct is offered for this purpose. Distinguishing between evidence of similar conduct to prove intent [the conduct on trial is admitted, but criminal purpose is denied], and the same evidence to prove design or plan [the conduct on trial is denied], Wigmore states, II *Wigmore* § 304 (3d ed. 1940):

> "In the former case [intent], the result is to give a complexion to a *conceded* act, and ends with that; in the present case [design or plan], the result is to show (by probability) a precedent design which in its turn is to evidence (by probability) the doing of the act designed. [Italicized word added.]
>
> The added element, then, must be, not merely a similarity in the results, but *such a concurrence of common features that the various acts are naturally to be explained as caused by a general plan of which they are the individual manifestations.*"

Rapoport did not deny knowledge of the SBA disclosure requirements or of the need to disclose his fee if it were for obtaining the loan. What Rapoport denied was the agreement itself or—in Wigmore's words—"the doing of the act in question." His knowledge and intent were not an issue. His conduct was.

The American Medical evidence was rank propensity evidence. It lacked that "concurrence of common features" which Wigmore finds essential to the receipt of evidence of "common scheme or design." It had no proper "probative value connected with the scope of the inquiry" at the second trial. And purportedly truthful answers by Rapoport, consistent with the prosecution's own evidence, would not have triggered any "further fruitful investigation." Rapoport's testimony in connection with American Medical was irrelevant and therefore immaterial, and could not properly form the basis for false swearing charges.

The conviction on Count Nine should be reversed and the count dismissed. And, because of its prejudicial impact on the whole trial, reversal on Count Nine should require reversal of the conviction in its entirety.

POINT III

The evidence was insufficient on all the false statement counts, since there was no evidence to establish that Rapoport was a "principal" who caused the false statements within the meaning of 18 U.S.C. 2(b).

The prosecution, having twice failed to convict Rapoport on the Entre Nous loan, in effect leveraged its case for the third trial by obtaining a new indictment which added six new false statement counts, and two false swearing counts. The deliberate tactic backfired during the third trial with the result that the prosecution was forced to proceed on *all* of the false statement counts on a theory of criminal liability which its evidence did not support.

A. The Prosecution's Dilemma

Rapoport neither made nor signed the purportedly false applications which formed the basis for his conviction on Counts Two, Three, Six and Seven. He was charged as an aider and abettor in violation of 18 U.S.C. 2 which provides in part:

> "Whoever . . aids, abets, counsels, commands, induces or procures [the commission of an offense], is punishable as a principal."

Conviction as an aider and abettor under 2(a) requires evidence that the defendant on trial provided assistance

to another person who was also guilty in that he acted with criminal intent. *United States* v. *Deutsch*, 451 F.2d 98, 118 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States* v. *De La Motte*, 434 F.2d 289 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971). Put another way, a Section 2(a) conviction requires evidence that the person whom the defendant allegedly assisted was himself *guilty* of the crime charged.

During the course of this trial however, as more fully detailed below, the makers and signers of the allegedly false applications of Electrical Precision (Counts Two and Three) and of Smuggler's Attic (Counts Six and Seven) testified that they did *not* believe that the loan applications which they had made and signed were false. In short, the prosecution's own evidence failed to establish the requisite *mens rea* on the part of those whose conduct Rapoport allegedly aided and abetted. Faced with this deficiency in its proof under Section 2(a), the prosecution consciously elected to proceed against Rapoport as a principal under the provisions of 18 U.S.C. 2(b) (Tr. 1035-1037). It provides:

> "Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Section 2(b) does not deal with aiding and abetting. Unlike Section 2(a), which imposes liability upon a person who assists another *guilty* person in criminal conduct, Section 2(b) identifies as a principal anyone who causes an *innocent* person to engage in conduct which is criminal in fact. The key to a Section 2(b) conviction is the innocence of the third party actor.

For this reason, the courts have held that Section 2(b) liability exists only where a criminal act is committed by

a person who is "caused" to act by the defendant, but who legally is innocent of any crime either (a) because he does not have knowledge of the facts, or (b) because he is so dominated and controlled by the defendant as to lack criminal responsibility for his conduct. *United States* v. *Kelner*, Docket No. 75-1290 (2d Cir. 1976); *United States* v. *Berlin*, 472 F.2d 13, 14 (9th Cir. 1973); *United States* v. *Levine*, 457 F.2d 1186 (10th Cir. 1972); *King* v. *United States*, 364 F.2d 235 (5th Cir. 1966). See also *United States* v. *Grasso*, 356 F. Supp. 814, 819 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973):

> "Defendant's conviction rests upon 18 U.S.C. § 2. . . . Although the conduct described in § 2(a) is apparently broad enough to overlap that described in § 2(b), it is clear that section 2, taken as a whole, proscribes two distinct forms of conduct: (1) participation in a criminal plan involving others who act with a criminal state of mind, and (2) the commission of a crime by the use of an innocent or irresponsible agent. . . ."

Having created its own predicament by its desire to finally convict this defendant, the prosecution was unable to establish that the makers and signers of the applications either were innocent intermediaries acting for Rapoport's benefit without knowledge of the facts, or were so dominated and controlled by Rapoport as to lack criminal responsibility for their conduct. This evidentiary insufficiency required the dismissal of *all* the false statement counts.

B. Electrical Precision (Counts Two and Three)

Stolar and Bernstein were the principals who signed the application. Each testified to complete knowledge of the facts. Each said they paid Rapoport to obtain the loan.

Each said they had read paragraph 10 which called for disclosure of any such fee. Their own testimony therefore failed to establish that they were unknowing and therefore innocent intermediaries acting on Rapoport's behalf.

There also was no evidence that Stolar or Bernstein were so dominated by Rapoport as to relieve them of criminal responsibility. Stolar said he made his *own* judgment "not to include" Rapoport's fee. Moreover, there was no evidence of that type of domination, i.e., physical duress, which is necessary to excuse a person from responsibility for conduct which is criminal. See, *e.g., United States* v. *Barash,* 365 F.2d 395 (2d Cir. 1966) and *United States* v. *Kahn,* 472 F.2d 272 (2d Cir.), *cert. denied,* 411 U.S. 982 (1973), both of which hold that even proved economic coercion is insufficient to justify otherwise criminal conduct.

C. Smuggler's Attic (Counts Five and Six)

Rosenbaum and Inspector made and signed the loan application. By their own admission, Rapoport never even discussed the application with them (A 35, 42). There was no evidence that Rapoport "caused" them to act either as unknowing innocent intermediaries or as dominated persons acting for Rapoport's benefit.

The prosecution sought to fill this evidentiary void with the testimony of Blonder, the accountant for Smuggler's Attic. Blonder said that Rapoport told him that Rapoport's name and fee need not be disclosed (A 45-46). But Blonder's testimony was insufficient to sustain Rapoport's conviction.

First, as a matter of sufficiency in a criminal case, we know of no authority for the proposition that Rapoport's alleged statement to Blonder is enough to prove that Rapoport thereby caused the officers Rosenbaum and Inspector

to make the false statement which is charged, especially since Blonder did not convey the alleged statement to Rosenbaum or Inspector.

Second, Blonder, Inspector, and Rosenbaum each testified that the fee was for obtaining the loan and therefore were not innocent intermediaries who acted without knowledge of the operative facts (A 34, 40, 46). And there was no evidence to establish Rapoport's domination of any of these men. In fact Blonder testified that he did not believe and therefore rejected Rapoport's alleged statement that his fee need not be disclosed. Blonder swore that he exercised his own judgment in failing to disclose Rapoport's fee (A 46).

D. Entre Nous (Count One)

The evidence on Entre Nous was clearly sufficient to support a Section 2(a) conviction of Rapoport. Pollak admitted *mens rea* and testified to Rapoport's guilty assistance. But the prosecution deliberately chose to proceed against Rapoport on a Section 2(b) theory with regard to Entre Nous also (Tr. 1035-1037). Since Pollak was neither an innocent intermediary nor dominated by Rapoport for reasons which would relieve Pollak of criminal responsibility, the evidence was clearly insufficient to convict Rapoport as a Section 2(b) principal.

* * * * *

The prosecution simply failed to prove the case it ultimately elected to prosecute on the false statement counts. Its problem was generated by its obvious anxiety to convict Rapoport. It could have put Rapoport to trial a third time on the Entre Nous loan. Instead the prosecution proliferated tenuous other false statement counts. The prosecution did not meet the burden which its own evidence

later caused it to assume. The false statement convictions must be reversed. Each of the false statement counts must be dismissed.

POINT IV

With one exception, the loan applications were not false within the meaning and requirements of 18 U.S.C. 1001, 1014. At best, the applications were incomplete, but concealment does not violate these sections as charged.

Of the false statement counts, One, Two, and Six alleged a violation of 18 U.S.C. 1001. Counts Three and Seven alleged a violation of 18 U.S.C. 1014. All of these counts rested upon the responses in paragraph 10 of the individual loan applications. The Section 1014 counts rested upon the submission of those applications to the particular lending bank. The Section 1001 counts rested upon the submission of the same applications to the SBA.

18 U.S.C. 1001 prohibits affirmative false statements *and* concealment. The indictment did not charge concealment in violation of Section 1001, and Judge Brieant ruled that concealment could not form the basis for conviction. See *United States* v. *Diogo,* 320 F.2d 898 (2d Cir. 1963); *United States* v. *Adcock,* 447 F.2d 1337 (2d Cir.), *cert. denied,* 404 U.S. 939 (1971).

18 U.S.C. 1014 prohibits affirmative false statements. No part of the statute prohibits concealment.

An initial question of sufficiency therefore was whether the applications contained affirmative false statements about Rapoport's alleged fee agreement. With one exception, Entre Nous, no affirmative misrepresentations were

made. Counts Two, Three, Six and Seven should have been dismissed for this reason.*

Paragraph 10 of the Entre Nous application was filled in "NONE", which constituted an affirmative false statement if Rapoport in fact were to receive his fee for obtaining the loan (A 177; GX 1).

The other applications were different. Each stated in paragraph 10 that named accountants were receiving a fee. Each was otherwise silent. None stated that Rapoport was *not* receiving a fee (A 181-185; GX 2, 3, 4). The short of the matter is that Rapoport's alleged fee agreement was concealed, but was not affirmatively misrepresented in these other applications. The evidence was insufficient to support the verdict unless concealment violates Section 1014 and Section 1001, as charged. Concealment is not a violation. *United States* v. *Diogo, supra; United States* v. *Adcock, supra.* Counts Two, Three, Six and Seven should have been dismissed.

The error was repeated in the court's instructions. Having first stated that it would not charge concealment as a violation of either Section 1014 or Section 1001 (Tr. 1038), the court reversed itself and instructed the jury that a "half-truth" was sufficient to establish guilt (A 155). A proper exception was taken which the court deemed to reach possible conviction under either statute (Tr. 1203-1204). There is no way to determine whether the jury convicted on the basis of a false statement or on the basis of concealment and a "half-truth." The convictions on the false statement counts therefore must be reversed. *United States* v. *Natelli,* 527 F.2d 311 (2d Cir. 1975).

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* The difference between Entre Nous and the other applications most probably explains why the prosecution waited until its unusual *third* indictment to charge the other applications as substantive offenses.

POINT V

The court's instructions were erroneous in several material respects.

I. The court instructed the jury that interest in the outcome of the case "may create a motive to testify falsely", and next stated that "the interest of a defendant is of a character possessed by no other witness and, therefore, a matter which may affect the weight which should be given to that [the defendant's] testimony."

Acceptable insofar as it went, this instruction became error when the court failed to state also, as specifically requested, and as is ordinarily done in this Circuit (A 163):

> "However, it by no means follows that simply because a person has a substantial interest in the result he is not capable of telling a straight-forward or truthful story."

This portion of the standard instruction was essential in this case where Rapoport's own testimony was basically his only defense. It was also required in simple justice since the only evidence against Rapoport was the testimony of immunized prosecution witnesses who clearly had as much to gain by their testimony as Rapoport did by his. The incomplete instruction also bore directly on the false swearing charge, since it also imputed an evil motive to Rapoport's second trial testimony, without the balancing language which ordinarily is given and which, we believe, is required.

II. The court instructed that the American Medical transaction could be considered as evidence of "guilty knowledge and intent" on the false statement counts (A 155-156). For reasons already given, Point II, *supra,* this was

error. This was not a case of conceded conduct, with knowledge and intent the only defense. Here Rapoport denied the transactions or, in Wigmore's words, "the doing of the act in question." The instruction was especially prejudicial since, as we have noted, the only testimony the jury requested was of the American Medical transaction.

III. The court refused to charge that Rapoport's good faith was a complete defense (A 162). Since Rapoport's guilt or innocence turned upon what he believed to be his fee agreements, and since there was reason to suggest that the various applicants might well have understood what they wanted to understand rather than what in fact was said, the requested instruction on Rapoport's understanding and good faith was fair and should have been given. See *United States* v. *Diogo,* 320 F.2d 898, 905-907 (2d Cir. 1963).

IV. During his direct examination, Rapoport blurted out that his second trial had ended in a 9-3 hung jury in his favor (Tr. 929). The testimony was struck (Tr. 934-937). In its final charge, the court instructed the jury to disregard the testimony, characterizing it as "uncalled for" and "unfortunate" (A 154-155). The court continued however to state that such "an estimate of the vote is frequently based upon hearsay or misinformation or just plain wishful thinking. . . ." (A 155).

The truth is that knowledge of the 9-3 vote at the second trial was based upon information provided to the Assistant United States Attorney by jurors whom he chose to interview while they were in the corridor immediately after their discharge (Tr. 1203). In these circumstances, the characterization of Rapoport's testimony as "just plain wishful thinking" was incorrect. It also constituted improper judicial testimony on a fact of which the court had

no knowledge. The court should not have gone so far in its instructions in these circumstances. The effect of its characterization was to cast doubt on Rapoport's essential credibility in a case where, as we have said so often, his own word was his basic defense.

Moreover, since it was the prosecution which originally elicited the vote from the second trial jurors, we believe it had an actual responsibility to join in our request for clarification.

POINT VI

The conviction on the Entre Nous loan should be reversed and the count dismissed by reason of Government misconduct amounting to participation in the crime alleged.

The First Count charged Rapoport as an aider and abettor in making a false statement in the Entre Nous application to Manufacturers Hanover Trust Company. The alleged false statement was the declaration "NONE" in paragraph 10 of the application which called for disclosure of any fees paid or to be paid to third parties for obtaining the loan. The prosecution claimed that Rapoport was to receive a fee for obtaining the loan and that the word "NONE" was a false statement.

The prosecution, as an accommodation to Pollak, its chief witness, deliberately withheld the very same alleged information from the bank. So too did the SBA. In effect, the government participated in the very crime alleged for no good reason, and with the improper motive of satisfying the borrower-witness Pollak.

Pollak began his cooperation on June 6, 1974. The allegedly false loan application already had been filed with Manufacturers. The alleged conspiracy and false state-

ment offenses were complete. The prosecution however played along with Pollak and did not stop the loan, ostensibly in order to obtain additional incriminating evidence against Rapoport.

The loan closed on July 18, 1974. Before it was disbursed however, the prosecution served a grand jury subpoena on Manufacturers calling for the Entre Nous file. The bank told Pollak it would not disburse the loan in the face of the subpoena. Pollak asked Assistant George Wilson to help. The Assistant called the bank and said the subpoena should not affect its business judgment in disbursing the loan. The Assistant however did *not* tell the bank that the government believed an undisclosed 10% fee agreement existed in connection with the loan. Manufacturers would not have disbursed the loan had it been told of the government's belief (A 101, 139-140, 145).

$80,000 of the $150,000 loan was disbursed. The balance was escrowed pursuant to the loan agreement. On August 16, 1974, Pollak took the Fifth Amendment before the grand jury. By late September 1974, Entre Nous had spent its $80,000. Pollak asked the bank to invade the $70,000 escrow account. It refused since some portion of the $80,000 had been spent for unauthorized purposes, and since the $70,000 in escrow was for plant and machinery per the loan agreement. Pollak again called the Assistant for help. The Assistant called the SBA. The SBA prevailed upon Manufacturers to release $15,000 from the escrow account. Again, the bank was not told of the alleged secret 10% fee agreement. Pollak testified before the grand jury soon thereafter on November 3, 1974. The entire Entre Nous loan was in default by year-end (A 95-100, 102, 140-145).

The government's assistance to Pollak was unconscionable. In effect it aided and abetted Pollak's allegedly material misrepresentation in paragraph 10 that no fee had been or would be paid in connection with the loan. Manu-

facturers would not have disbursed the loan but for the government's failure to disclose its belief.

There was no legitimate reason for this concealment. The alleged crimes were complete. The loan was closed. Tape recordings had been obtained. Rapoport had received a $3,500 check in partial payment of his fee. The only purpose for the concealment was to accommodate and benefit a "cooperating" prosecution witness who, as a result, received approximately $95,000 in loan monies which, on the prosecution's theory, should not have been disbursed.

The government's participation in the crime alleged is similar to that condemned in *United States* v. *Archer,* 486 F.2d 670 (2d Cir. 1973). At the least it was conduct unbecoming an enforcement agency and placed the United States *in pari delicto* with Rapoport and Pollak. The prosecution should be disciplined with the sanction of dismissal. For these reasons, the conviction on the First Count should be reversed and that count dismissed.

CONCLUSION

The judgment of conviction should be reversed. The indictment should be dismissed.

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Respectfully submitted,

CURTIS, MALLET-PREVOST, COLT & MOSLE
Attorneys for the Defendant Rapoport
100 Wall Street
New York, New York 10005
(212) 248-8111

PETER FLEMING JR.
JOHN E. SPRIZZO
ELIOT LAUER
Of Counsel